provisions require rates that reflect the forward-looking economic costs that determine rates in competitive markets (id. ¶¶ 690-93), and preclude rates based upon backward-looking, or embedded-cost studies. Id. ¶¶ 704-11.

BellSouth claims (Br. 39) that its rates are cost-based because the LPSC has declared them so and because, in BellSouth's view, the Eighth Circuit has deprived this Commission of any jurisdiction to review whether UNE-rates are cost-based. That decision, which remains pending on certiorari before the Supreme Court, was incorrectly decided. Because "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authorization," the Commission must "conclude[] to its own satisfaction" that the BOC has satisfied all "statutory requirements," and need not "give the State commissions' views any particular weight." SBC v. FCC, 138 F.3d 410, 416-17 (1988). The undisputed facts in this case demonstrate that BellSouth is not providing UNEs at cost-based rates, and provides an independent basis on which this Commission should reject BellSouth's application. Indeed, the record aptly illustrates why blind deference to a state commission's finding of cost-based rates is incompatible with the Commission's statutory obligation to determine checklist compliance and the public interest when evaluating a section 271 application.

The nearly four hundred recurring and nonrecurring charges set forth in BellSouth's SGAT and adopted in the LPSC Pricing Order are based on BellSouth's cost studies that were essentially backward-looking in nature. BellSouth revealingly explained that "it has performed studies in accordance with the forward-looking methodology mandated by this Commission and by the FCC, but that it has done so in a manner that will allow it to recover its actual costs." See Follensbee Aff. ¶ 9 (emphasis added). For example, while "forward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future," (Local Competition Order ¶ 683), BellSouth's view was that "the TSLRIC definition . . . directs an analysis of available technology as of the date BellSouth placed equipment into service and not as of the date of the cost studies." See Follensbee Aff. ¶ 10 (emphasis added).[20] Indeed, BellSouth's backward-looking "lens" irreversibly distorted every aspect of its cost studies.

Many of BellSouth's most critical network element charges also reflect clear violations of the Act's requirements. With respect to non-traffic-sensitive switching costs, for example, BellSouth somehow combined an LPSC ruling that vertical features are separate network elements with "1996 historical data" (which the LPSC staff properly recognized "is not relevant to this proceeding") to produce a port with a vertical features charge of almost $12 -- six times higher than the high end of the Commission's port proxy range, more than triple the rates approved in most other states and nearly double the rate approved in the next highest state and guaranteed to produce multiple recovery of resource costs. See Follensbee Aff. ¶¶ 28-32; Final Recommendation at 50. And BellSouth's studies employed statewide averaged loop rates, id. at 24, notwithstanding conceded and significant cost differences, in direct contravention of this

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20 Similarly, BellSouth refused to base its cost proposals on a "reconstructed" network using the most efficient technology because "prices based upon such costing methods will be below BellSouth's costs to provide interconnection and unbundled elements." See Final Recommendation at 18 (emphasis added). Rather, BellSouth's studies used "'existing cable route, sites and types of placement,'" and "the existing type of placement (aerial, buried or underground) was chosen." Follensbee Aff. ¶ 11 (quoting Bell South affiant); see also Final Recommendation at 42 (BellSouth's calculation of its shared and common costs improperly "assume[d] a business as usual view"); id. at 46 ("BellSouth based its calculations on its actual utilization levels," rather than efficient forward-looking narrowband practices); id. at 34 ("BellSouth d[id] not dispute that its depreciation rates are designed to recover past investments"); compare Local Competition Order ¶ 686 ("properly designed depreciation schedules should account for expected declines in the value of capital goods") (emphasis added).

Commission's finding that the Act mandates that "rates for interconnection and unbundled elements must be geographically deaveraged." Local Competition Order ¶ 764.

The LPSC Staff's cost consultant, Ms. Dismukes, made limited adjustments to some of the inputs in those BellSouth cost studies that she was able to access, but was unable to address the myriad other defects in the BellSouth studies. As BellSouth has subsequently conceded, Ms. Dismukes "'did not modify underlying network technologies, basic design, study methodology or the models themselves.'" See Follensbee Aff. ¶ 14 (quoting BellSouth affiant). Indeed, she was not able even to review many of the individual costs studies or assumptions, while for others her review was incomplete.[21] As a result, the adjusted proposed rates were still largely based on BellSouth's flawed methodology and reflected BellSouth's backward-looking approach.

Given these fatal and uncorrected flaws, BellSouth's studies produced extraordinarily high "costs." Even accounting for the adjustments proposed by Ms. Dismukes, for example, for the loop and port alone BellSouth sought more than $30 in fixed monthly recurring charges -- with only partial vertical feature functionality. Follensbee Aff. ¶ 12. This $30 excludes the enormous nonrecurring (approximately $57 per loop and port), collocation (some of which are unspecified) and other charges that BellSouth would assess to make those elements "operational." Id. In sum, simply labeling cost-studies "forward-looking" does not make them so.

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[21] For example, with respect to the nontraffic-sensitive switching costs noted above, Ms. Dismukes conceded that it was "not necessarily clear precisely what those costs are that are entering into the [BellSouth vertical features] model," and properly questioned, for example, why, as BellSouth assumed, "additional land or costs would be required if all you are doing is providing features from the switch." See Follensbee Aff. ¶ 31 (quoting Dismukes Test. at 3111 (emphasis added)). However, based on analyses that Ms. Dismukes had difficulty describing, and citing lack of time to complete her analysis, Ms. Dismukes managed to reduce this patently outlandish vertical features charge by only 16%. See Follensbee Aff. ¶¶ 31-32.

On October 17, 1997, the ALJ issued a Final Recommendation to the LPSC. In her 66-page point-by-point analysis, the ALJ flatly rejected BellSouth's position on virtually every costing and pricing issue and recommended that the LPSC order BellSouth to conduct additional cost studies consistent with forward-looking principles.[22] Because of the inadequacy of Ms. Dismukes limited review of, and adjustment to, the flawed BellSouth studies, the ALJ further recommended that her proposals, when used at all, serve only as interim rates to be replaced by permanent rates determined in accordance with appropriately forward-looking cost studies.

Five days later, in a brief order and without one word of explanation, the LPSC scrapped the ALJ's recommendations in their entirety and approved the four hundred recurring and non-recurring charges proposed by BellSouth, with only the limited adjustments made by the staff's cost consultant. See LPSC Pricing Order. Given the clear need on this record for further proceedings to set rates uncontaminated by the backward-looking bias of BellSouth's cost studies, the LPSC's decision is plainly arbitrary and capricious. It thus provides no basis for this Commission to find "to its own satisfaction" that UNE-prices in Louisiana are cost-based. See SBC v. FCC, 138 F.3d at 416.

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[22] See, e.g., Final Recommendation at 57 ("We concur with the conclusions of the Michigan Commission, the FCC, intervenors, and Commission Staff, that forward-looking costs should not reflect a company's facilities costs"); id. at 58 n.94 ("We specifically reject BellSouth's argument that the TSLRIC definition . . . directs an analysis of the technology available at the time BellSouth placed individual facilities or equipment into service as opposed to the date of the cost studies"); id. at 26 ("we reject the use of statewide average rates"); id. at 39 ("we find that BellSouth's proposed depreciation rates do not reflect forward-looking costs, and are inadequate for the purposes of this proceeding"); id. at 55 ("we conclude that rates for collocation are subject to the same pricing standards applicable to interconnection and unbundling").

I. BellSouth Has Failed To Establish Just And Reasonable Arrangements For The Recovery Of Reciprocal Compensation

BellSouth denies the right of all CLECs to recover reciprocal compensation for traffic terminated to internet and other enhanced service providers ("ESPs"). It has thus failed to establish "just and reasonable" reciprocal compensation arrangements for the transport and termination of traffic. See §§ 271(c)(2)(B)(xiii); 252(d)(2)(A).

BellSouth claims (Br. 60) that the Act's reciprocal compensation obligations do not apply to traffic terminated to Internet service providers and other ESPs because this traffic is not "'local' traffic." The Commission long ago ruled, however, that ESPs are to be "treated as end users," not as carriers. Enhanced Service Providers Order at note 8 (emphasis added). When a call is placed to an ESP, the call must be treated as though it terminates with the ESP, just as a call to any other end user would terminate. Accordingly, if the caller and the ESP are located in the same local area, the call is treated as one "that originates and terminates within a local area" (Local Competition Order ¶ 1034) and is thus part of the traffic to which the reciprocal compensation obligation applies.[23]

Although BellSouth acknowledges the Commission's ruling in other contexts,[24] its refusal to do so for purposes of determining reciprocal compensation improperly denies new

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[23] In arguing to the contrary, BellSouth focuses myopically on the Commission's jurisdiction over ESP traffic and ignores the Commission's regulation of that traffic. It is true that the Commission has jurisdiction over ESP traffic because the end-to-end nature of such communications is interstate. See Br. 60; Varner Aff. ¶ 197. The Commission has nevertheless concluded that such interstate traffic should be treated as local. It is this regulatory treatment, not its jurisdictional basis, that renders ESP traffic local for purposes of the reciprocal compensation obligation.

[24] BellSouth does not prohibit ESPs from purchasing state-tariffed business lines or private lines on the ground that ESPs are not "local" service customers, nor does it report any of its business line revenues, expenses or investment as "interstate" on the basis of ESP use of those lines. See Hamman Aff. ¶ 60.

entrants a significant amount of revenue they are entitled to recover. As the Commission is aware, holding times on ESP traffic are, on average, considerably longer than most local calls. Thus, a CLEC serving an ESP could expect to recover a significant amount of local compensation. (Alternatively, if ESP traffic is excluded from reciprocal compensation, a CLEC using unbundled switching will pay terminating switch usage on ESP traffic but will not receive an offset for this potentially significant amount of traffic under BellSouth's unilaterally announced "offset" policy). Ultimately, AT&T believes the Commission should change its regulatory treatment of ESPs and require them to pay cost-based access charges.[25] Unless and until the Commission does so, however, BellSouth is not free to overrule the Commission's determination and declare internet traffic non-local in order to escape its reciprocal compensation obligations.

J. BellSouth Does Not Provide Nondiscriminatory Access To Poles, Ducts, Conduits, and Rights of Way

Section 271(c)(2)(B)(iii) requires that BellSouth provide nondiscriminatory access to its poles, ducts, conduits and rights-of-way at just and reasonable rates in accordance with the requirements of section 224 of the Act. See also Local Competition Order ¶ 1157. BellSouth's scant evidence of compliance consists primarily of a "standard license agreement" (Att. D to its SGAT (Exhibit AJV-1)) -- and the conclusory affidavit of Linda Kinsey. Those materials make clear that BellSouth does not meet its obligations under the Act.

First, BellSouth provides discriminatory access to the records showing the location of BellSouth's existing facilities. Ms. Kinsey admits that BellSouth's "employees and/or

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[25] See Comments of AT&T Corp., In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switching Network by Information Service and Internet Service Providers, CC Docket Nos. 96-262, 94-1, 91-213, 96-263 (March 24, 1997).

contractors have more immediate and direct access to these records than CLECs." Kinsey Aff. ¶ 9. Whereas BellSouth has immediate access to up-to-date paper records, or to a CD-ROM version (updated monthly), CLECs must either wait up to five business days to inspect such records at a designated Records Maintenance Center or wait up to 20 business days to receive such records in the mail. Id. ¶¶ 9-10. Moreover, although a BellSouth employee can determine immediately whether spare capacity is available, CLECs must wait as many as 45 days for BellSouth to inform them whether such capacity is available. Id. ¶ 6.

Even the discriminatory time frames referenced in Ms. Kinsey's affidavit do not appear in the standard license agreement. Instead, that agreement provides that the time frames for BellSouth to provide necessary records, determine space availability, and process individual license applications are all subject to negotiation:

> The parties agree to the establishment of a joint task force . . . . Matters to be addressed by the joint task force include, without limitation, the development of time frames for BellSouth's provision of record information and availability determinations and for the processing of license applications; the establishment of guidelines to address the number of CLEC applications which may be processed simultaneously by BellSouth; and any other matters necessary to effectuate the provisions of this Section.

Standard License Agreement, § 1.5.4.3 (emphasis added). In short, contrary to Ms. Kinsey's representations, these time frames -- which are critical to any carrier attempting to provide local service using its own facilities -- must all be negotiated individually by CLECs with BellSouth. Because BellSouth has not committed to any time frames regarding access to its poles, ducts, conduits and rights-of-way -- much less nondiscriminatory time frames -- BellSouth has failed to demonstrate that it has satisfied this checklist item.

K. BellSouth Has Failed to Resell Its Services Free of Unreasonable And Discriminatory Limitations As Required By Section 251(c)(4)(B)

BellSouth also still does not comply with its checklist obligation to make retail services "available for resale in accordance with the requirements of sections 251(c)(4)." § 271(c)(2)(B)(xiv). Section 251(c)(4)(B) prohibits incumbent LECs from imposing "unreasonable or discriminatory conditions or limitations" on resale. In its Louisiana Order, the Commission correctly found that BellSouth had violated this statutory command, and thus failed to comply with the resale checklist item. Louisiana Order ¶ 64. Rather than reevaluate its policies on resale for compliance with the essentially unrestricted right of resale conferred by the Act, however, BellSouth simply corrected the most glaring flaw identified in the Louisiana Order -- namely, its prior refusal to make contract service arrangements ("CSAs") available for resale at wholesale rates. BellSouth's miserly approach to compliance leaves in place two other unlawful restrictions in its resale offerings.

First, BellSouth refuses to permit resellers to aggregate the traffic of their end users in order to qualify for the substantial volume discounts BellSouth offers at retail through CSAs.[26] This significant restriction on resale is flatly contrary to prior determinations of the Commission. See AT&T Comm. v. BellSouth Telecomm., Inc., No. 5:97-CV-405-BR at 29 (E.D.N.C. May 22, 1998) (BellSouth's "end-user restriction" must be "struck down" as inconsistent with the "FCC's interpretation"); AT&T Comm. v. Pacific Bell, No. C 97-0080 SI (N.D. Cal. May 11, 1998) (holding similar restriction unlawful under the Act and FCC regulations).

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[26] AT&T comments on BellSouth's first application alleged that BellSouth did not permit end-user aggregation, see AT&T Comments at 59-60, and AT&T again raised the point in its meet and confer letter of July 7, 1998. See Hamman Aff. Att. 7 (Letter of S. Garavito (AT&T) to Victoria K. McHenry (BellSouth) (July 7, 1998) at 5-6). Both in its Reply Comments on its first application and here, BellSouth neither denies the allegation nor defends its practice. It is thus precluded, under the Commission's rules, from arguing the point for the first time in reply.

As the Commission ruled in its Local Competition Order, "it is presumptively unreasonable for incumbent LECs to require individual reseller and end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in the aggregate, under the relevant tariff, meets the minimum level of demand." Local Competition Order ¶ 953. The Commission reaffirmed the Act's prohibition on bans on end-user aggregation in its Texas Preemption Order. See id. ¶¶ 218-20 (invalidating Texas' "continuous property" restriction on resale of centrex service as "an 'unreasonable or discriminatory limitation' on resale" because it "effectively preclude[d]" new entrants from "aggregat[ing] small users into a large group, and thereby offer rates, services and features that are otherwise unavailable to a single user"). These decisions leave no doubt that BellSouth's refusal to permit end-user aggregation -- which has the anticompetitive effect of effectively foreclosing resale price competition as to residential and other lower-volume subscribers -- is an "unreasonable" restriction on resale that violates the Act. It is also a "discriminatory" restriction on resale because it denies resellers the volume discounts that any other retail purchaser would receive on comparable levels of purchases simply because the resellers are exercising their rights under the Act to compete at retail with BellSouth, a classic form of "common carrier discrimination" long prohibited by the Commission in the long-distance context. See Resale and Shared Use Order ¶¶ 102-06.

Second, BellSouth greatly restricts the subscribers to whom resellers can resell retail services offered through CSAs. As BellSouth admitted in connection with its prior application, it "restrict[s] the resale of CSAs to the end user for whom the CSA was established." Br. 67 n.43 (No. 97-231). BellSouth's revised SGAT does not negate this restriction. This restriction effectively precludes end-user aggregation because it denies resellers the ability to aggregate the demand of, and provide CSAs to, multiple end-users who would not otherwise have sufficient demand to qualify for volume discounts. As such. the restriction is unlawful for the same reasons discussed above. In addition, this restriction on resale is discriminatory, for it preserves BellSouth's right to offer CSAs to any end user it so chooses but denies resellers that same right. For this reason as well, BellSouth still does not provide resale in accordance with the Act's requirements.

II. BELLSOUTH CANNOT PROCEED UNDER "TRACK A" IN LOUISIANA

Apart from pervasive checklist noncompliance, BellSouth's second application should be denied because BellSouth has failed to meet the threshold requirements of section 271(c)(1)(A). BellSouth has not even alleged that it meets the requirements of Track B, and its assertions that it has satisfied the threshold requirements of Track A are plainly false under any standard. To proceed under Track A, a BOC must establish the existence of at least one "competing provider" of telephone exchange service that provides service both to "residential and business subscribers" either "exclusively" or "predominantly" "over its own telephone exchange service facilities." § 271(c)(1)(A). BellSouth's own data demonstrate that there is, as yet, no such provider.

A. There Are No Competing, Predominantly Facilities-Based Wireline Providers of Local Exchange Service in Louisiana

Buried in a BellSouth exhibit filed under seal is a simple chart that shows why BellSouth has not met Track A. This chart identifies six CLECs as having some wireline local exchange facilities, and shows how many access lines each CLEC serves, both as a reseller and over its own facilities. See Wright Conf. Aff. Ex. C. The chart reveals that none of these six carriers is predominantly facilities-based with respect to residential customers; each serves residential subscribers either exclusively or predominantly through resale, or not at all. Id. Thus, under the plain terms of section 271(c)(1)(A), none qualifies as a competing facilities-based provider to residential subscribers for purposes of Track A. See SBC Oklahoma Order ¶ 17 (rejecting SBC's application for lack of a "'competing provider[] of telephone exchange service . . . to residential . . . subscribers"), aff'd, SBC v. FCC, 138 F.3d 410 (D.C. Cir. 1998).

This conclusion holds even under the lenient test proposed by the Department of Justice, with which AT&T disagrees. In the Department's test, a single carrier may be considered a predominantly facilities-based carrier to both business and residential subscribers even if that carrier serves all residential subscribers through resale, "provided that the competitor's local exchange services as a whole are provided 'predominantly' over its own facilities" and its level of resale service reflects its own business judgment. Addendum at 3, DOJ Okla. Eval. Once again, none of the carriers meets this test. The three CLECs who actually offer service to residential subscribers -- American MetroComm, ACSI, and KMC -- are each predominantly resellers both to business and to residential subscribers, and thus "as a whole" are resellers. Id. None of the three remaining CLECs offers service to residential subscribers. See Wright Conf. Aff. Ex. C.

Specifically, of the remaining three CLECs on BellSouth's chart, two (Hyperion and Shell) concededly do not have any residential access lines at all.[27] The third CLEC, AT&T,

[27] They also do not qualify as "competing" providers to business subscribers because of their small presence. Hyperion and Shell each serve so few access lines (Wright Conf. Aff. Ex. C), that they do not yet constitute an actual and meaningful competitive alternative to BellSouth's business service. Cf. Ameritech Michigan Order ¶ 77 ("there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider'"). That some carriers have reserved "10,000 numbers" (Br. 4-5) is irrelevant, because to deploy a switch any carrier must reserve at least one NPA-NXX (i.e., 10,000 numbers). Because AT&T also cannot be considered a competing provider to business subscribers at this point (see note 28, infra), BellSouth also has not shown a competing facilities-based provider to business subscribers.

is alleged by BellSouth to have one resold residential access line (Wright Conf. Aff. Ex. C), but AT&T is not aware of any such line and has no tariff to support such an offer. Augier Aff. ¶ 5; see Ameritech Michigan Order ¶ 75.[28]

In sum, because no carrier in Louisiana is predominantly facilities-based as to residential subscribers, or is even (under the Department's test) predominantly facilities-based "as a whole" and a reseller to residential subscribers, BellSouth has not met the threshold requirements of Track A. BellSouth anticipated this problem, and yet went ahead with its application despite having no good answer to it. BellSouth states first that it is "counterintuitive" to suggest that a carrier that serves more subscribers through resale than over its own facilities should not be considered "predominantly facilities-based" and complains that it should not be "punish[ed]" if resellers have more lines than do facilities-based competitors. Br. 6, 8. This complaint has no merit, for it is BellSouth's own checklist noncompliance that has blocked successful facilities-based competition. Moreover, it was precisely to preclude BOCs from favoring resale competitors and obstructing meaningful facilities-based entry that Congress insisted on proof of at least one competing, "predominantly" facilities-based carrier.[29]

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[28] Apart from resale, AT&T cannot yet qualify as a competing provider of local exchange service to business customers. AT&T's "ADL" service is available only to large business long-distance customers (those with a PBX and at least a T1.5 link to AT&T's 4ESS switch), and provides them (in Louisiana) solely with the ability to use AT&T for outbound calls (local, 800, and 888). Hassebrock Aff. ¶ 12. Because AT&T cannot yet provide these customers with inbound local exchange service, AT&T cannot yet qualify as a "competing" provider with BellSouth for local exchange service.

[29] To the extent BellSouth's example (Br. 8) suggests an anomaly, that is a function of the small volumes of the carriers in its hypothetical, and is simply another reason why the Commission, as AT&T suggested, should have required proof of state-wide facilities-based competition to meet the "competing" provider requirement of section 271(c)(1)(A).

BellSouth alternatively argues that it should be allowed to mix and match a small pure residential reseller (Louisiana Unwired) with two small facilities-based business carriers (Hyperion and Shell) to meet the standard. Id. at 7. This solution is inventive; it bears, however, no rational relationship to the statute.[30] Even under the Department's reading of Track A, the predominantly resale-based provider to residential customers must simultaneously be predominantly facilities-based both to "business" and "as a whole." See DOJ Okla. Addend. at 2-4. Indeed, under any interpretation of section 271(c)(1)(A), the only agreements that count are those in which the BOC is providing access and interconnection to its network facilities "for the network facilities" of a competing carrier. § 271(c)(1)(A) (emphasis added). Because a pure residential reseller has no network facilities, agreements with such carriers are irrelevant to the analysis required by section 271(c)(1)(A). Thus, BellSouth has failed to show the presence of a facilities-based competing provider.

B. PCS Providers Are Not Yet Competing Providers For Purposes Of Track A.

Having no credible case for Track A based on wireline competition, BellSouth is forced once again to rely heavily on its argument that PCS providers qualify as competing providers for purposes of Track A. The argument is doubly convenient for BellSouth. It not only avoids the necessity of showing the existence of a real competitor, but it holds out the prospect -- if accepted -- of allowing BellSouth to meet Track A by pointing to providers who need less

[30] The absurdity of BellSouth's approach of considering multiple CLECs collectively to determine whether they are, as a group, predominantly facilities-based, is compounded by its claim that it may unilaterally choose which CLECs are to be considered as part of the group. If all resellers in Louisiana were included, rather than merely Louisiana Unwired, the collective group would not be "predominantly facilities-based" under any standard. Thus, BellSouth fails to satisfy Track A even under its interpretation unless it is able to exclude from consideration numerous CLECs. Such discretion is analogous to enforcing a rule that requires a student to maintain a C average by permitting the student to decide which grades to include when the average is calculated.

cooperation from BellSouth to succeed than do facilities-based carriers. The argument founders, however, on the same basic facts that undermined it last February. At most, as the Commission observed, PCS providers "are still in the process of making the transition 'from a complementary telecommunications service to a competitive equivalent to wireline services.'" Louisiana Order ¶ 73 & n.261 (internal citation omitted). No significant changes have occurred since then. See Roderick Aff. ¶¶ 3-9; Hubbard/Lehr Aff. ¶¶ 62-72.

Of course, PCS may one day serve as a substitute for wireline service. AT&T and other PCS providers are doing everything they can to hasten the arrival of that day. But BellSouth's own evidence makes clear that that day has not yet come.

For example, BellSouth's own data show that substantially fewer than 1 percent of Louisiana consumers have replaced their local wireline service with PCS. Specifically, PCS is now used by only a tiny fraction (about 1.5 percent) of telephone subscribers in Louisiana, and even among this small group, only 4 to 6 percent have replaced their residential wireline phones with PCS service. See Br. 12-13 (citing M/A/R/C Study at Table 4); Hubbard/Lehr Aff. ¶ 62. And BellSouth's case for PCS service being competitively priced rests on assumptions -- such as that PCS users would otherwise pay for more than a de minimis number of intraLATA calls -- that are factually unfounded. See id. ¶¶ 66-72.

Not surprisingly, BellSouth itself is forced to admit that it "does not contend that PCS service is a 'substitute' for BellSouth's wireline service for all Louisianans." Br. 15 n.4. But BellSouth's rationalization -- that this Commission has not required "'any specified level of geographic penetration by a competing provider'" (id., quoting Ameritech Michigan Order ¶ 76)

-- is a non sequitur.[31] The reason PCS service is not a substitute for all Louisianans is not because of limited geographic availability; indeed, PCS service is widely available. Rather, PCS service is not a substitute because certain attributes of the service itself make it, at least at this time, unacceptable to nearly all Louisianans as a substitute for BellSouth's wireline service. See Roderick Aff. ¶ 6; Hubbard/Lehr Aff. ¶ 64. Accordingly, PCS providers do not qualify today as competing providers of local exchange service for purposes of Track A.

III. BELLSOUTH AND BSLD CURRENTLY OPERATE IN VIOLATION OF SECTION 272 AND HAVE FAILED TO DEMONSTRATE THAT THEY WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY

Before BellSouth and BSLD can be authorized to provide in-region interLATA services, they must show that the "requested authorization will be carried out in accordance with the requirements of section 272." § 271(d)(3)(B). This requirement is "of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate." Ameritech Michigan Order ¶ 346. BellSouth and BSLD wholly fail to meet their burden, and continue openly to defy the requirements of the Act, and the

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[31] The Commission held that Brooks Fiber was a competing provider because it had 10,000 customers in two parts of the state. Inherent in that finding is the presumption that Brooks Fiber's wireline service was a complete substitute for Ameritech's wireline service, and that Brooks Fiber, given time, could expand that offering elsewhere in the state. By contrast, BellSouth's evidence demonstrates that 96 percent of personal PCS users in Louisiana do not view PCS as a substitute for their wireline service. PCS providers, therefore, are not yet "competing" to replace BellSouth's wireline service for reasons inherent to the nature of PCS service, and not due to geographic unavailability.

Commission's holding in the Ameritech Michigan Order (¶ 371), by asserting that they are not now subject to the restrictions of section 272.[32]

A. BellSouth And BSLD Have Not Disclosed "All Transactions" As Required by Section 272(b)(5)

Section 272(b)(5) requires that "all transactions" between a BOC and its interLATA affiliate be "reduced to writing and available for public inspection." § 272(b)(5). These disclosure requirements, as the Commission made plain in the Ameritech Michigan Order, have required BOCs and their section 272 affiliates, since the passage of the Act on February 8, 1996, to make publicly available all transactions for information, services, or facilities in which they have been engaged. Ameritech Michigan Order ¶ 371. In addition, the Accounting Safeguards Order, issued December 24, 1996, requires that all BOC transactions with section 272 affiliates be posted on the Internet within ten days,[33] and these requirements became effective on August 12, 1997.[34] To meet the disclosure requirements of section 272(b)(5), "the description of the

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[32] BellSouth asserts, without discussion or citation to authority, that section 272 only binds a BOC and its long-distance affiliate after interLATA authority has been granted. See, e.g., Cochran Aff. ¶¶ 9, 21. Section 272, however, contains no such limitation, and instead applies by its terms as soon as a BOC creates an affiliate to provide interLATA services. The fact that section 271(d)(3)(B) calls on this Commission to make a predictive judgement that a BOC and its section 272 affiliate "will comply" with section 272, does not alter the fact that section 272 itself mandates current compliance, as the Commission has found, Ameritech Michigan Order ¶ 371. In any event, BellSouth -- which has created a section 272 affiliate, has engaged in numerous transactions with that affiliate, and has stated that it has been and currently is in compliance with section 272, see Br. 66-67 -- cannot hope to meet its burden of establishing that it "will comply" with section 272 unless it shows that it currently is complying with section 272.

[33] The Accounting Safeguards Order requires the Section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transactions through the company's home page." Accounting Safeguards Order ¶ 122.

[34] Accounting Safeguard Rule Changes Requiring OMB Approval Soon to be Effective, Public Notice, DA 97-1669 (rel. Aug. 5, 1997).

asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow [the Commission] to evaluate compliance with [the] accounting rules," including disclosing the rates for each individual transaction and the method of valuation used in setting those rates. Accounting Safeguards Order ¶ 122; Ameritech Michigan Order ¶ 369.

BellSouth has been and continues to be in violation of these disclosure requirements under section 272(b)(5) and the Accounting Safeguards Order. BellSouth and its section 272 affiliate, BSLD, have engaged in regular and substantial transactions with each other since BSLD was incorporated in March 1996, but nonetheless have refused to disclose any details regarding what they identify as over $7.7 million worth of "past transactions," many of which were still ongoing in October and November 1997, well after the effective date of the Accounting Safeguards Order. McFarland Aff. ¶¶ 25-32. Instead, for these transactions BellSouth and BSLD disclose only bare summaries of twelve different categories of "services" provided by BellSouth to BSLD. These summary descriptions do not disclose rates, as required by the Commission, Ameritech Michigan Order ¶ 369, but instead provide only total billing figures for all the transactions grouped under the particular service category. McFarland Aff. ¶¶ 25-26. Nor do these descriptions identify the specific terms and conditions of each individual transaction, or even the timing of the individual transaction. Id. ¶ 28. This meager disclosure precludes any finding that BellSouth and BSLD will comply with the requirements of section 272. Cf. Ameritech Michigan Order ¶ 369 ("Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272.")

The disclosure provided by BellSouth and BSLD for what they identify as their "current transactions" also fails to satisfy section 272(b)(5). Instead of providing details concerning individual transactions, BellSouth and BSLD disclose only the general contractual framework for anticipated transactions, and do not provide specific information about transactions that may or may not have been concluded under these agreements. McFarland Aff. ¶¶ 33-34.[35] This limited disclosure makes it impossible to determine whether a transaction even took place under a particular agreement, what specific asset, service, or information was transferred and at what price, or when the transaction was completed. Id. ¶ 34. Such disclosure is plainly insufficient under section 272(b)(5), which requires disclosure of "each individual transaction," Ameritech Michigan Order ¶ 369, with detail sufficient to allow the Commission, IXCs, and CLECs "to determine the specific services and facilities that a BOC provides to its section 272 affiliate," Non-Accounting Safeguards Order ¶ 252.[36]

BellSouth and BSLD also have displayed a complete unwillingness to post "detailed written descriptions" of their transactions on the Internet "within 10 days of the transaction." Accounting Safeguards Order ¶ 122. Indeed, BellSouth and BSLD did not post information regarding a number of substantial transactions that concluded between September 1997 and November 1997 until after its present application was filed, more than six months after these transactions were completed. McFarland Aff. ¶¶ 47-48. Moreover, it is far from clear that the

[35] It also appears that BellSouth and BSLD have disclosed information regarding only some, rather than all, of their past and current transactions. See Ameritech Michigan Order ¶ 371; McFarland Aff. ¶¶ 30-31, 35.

[36] In addition, some of the disclosed "current transactions" contain no information on rates, disclose rates that on their face fail to comply with the accounting rules, or contain no information on the method of valuation used in setting the rates. See Ameritech Michigan Order ¶ 369 (requiring that disclosures include both rates and valuation methods); McFarland Aff. ¶¶ 36-39.

posted information is either accurate or complete. The posted agreements differ in significant respects from similar agreements made available for public review by BellSouth at its place of business, and BellSouth recently dropped, without explanation, four "past transactions" previously listed on this Internet site, which involved total billings of $2,415,609. McFarland Aff. ¶ 50. On this record, it is plain that BellSouth and BSLD have not, and will not, comply with the Internet posting requirements.

Finally, BellSouth and BSLD have failed to provide any information in this application concerning services, facilities, or information provided for BSLD by nonregulated affiliates. Such transactions must be disclosed under section 272(b)(5) if they involve "local exchange and exchange access facilities and capabilities" that had been transferred by a BOC to a nonregulated affiliate, Non-Accounting Safeguards Order ¶ 309; Ameritech Michigan Order ¶ 373, or if they involve "chain transactions" where a nonregulated affiliate stands between the BOC and the section 272 affiliate in the provision of assets, information, or services. Accounting Safeguards Order ¶ 183. BellSouth and BSLD must disclose sufficient information regarding transactions involving nonregulated affiliates to demonstrate that none of these transactions are subject to the disclosure and nondiscrimination obligations of section 272. See Ameritech Michigan Order ¶ 373 (directing Ameritech to provide "adequate information" in future applications to evaluate whether transactions with nonregulated affiliates should be disclosed under section 272(b)(5)). BellSouth and BSLD have not even attempted to make such a showing. McFarland Aff. ¶¶ 51-53.

B. BellSouth And BSLD Have Not Shown They Are Employing Sufficient Compliance Programs

BellSouth and BSLD also have not presented evidence that they have put in place and are actively employing sufficient internal procedures or systems to protect against violations of section 272. Absent such evidence, BellSouth cannot prove that it is ready and able to comply with its obligations under section 272. McFarland Aff. ¶ 60. For example, some BOCs have required that all communications and transactions proceed through identified contacts to attempt to ensure that access to information and services is uniform for affiliates, CLECs, and IXCs, and to limit unlawful "off-the-record" exchanges of information and services between the BOC and affiliate. Id. ¶ 59. Such a program would assist in reducing the risk of past BellSouth employees currently with BSLD from obtaining discriminatory services and information from their former coworkers at BellSouth -- a problem that BellSouth itself has identified when its employees leave and go to work for competitors. Id. ¶¶ 56-57.[37] Procedural impediments to discrimination such as this -- as opposed to the simple training programs relied on by BellSouth and BSLD, see Br. 70 -- are crucial in this environment, where BellSouth and BSLD employees have strong incentives to engage in discriminatory conduct, and likely view each other as all part of the BellSouth family of corporations, with common interests and goals. See McFarland Aff. ¶¶ 56, 58.

C. BellSouth And BSLD Have Not Established That They Have Identified And Corrected Past Improper Subsidization

When a BOC elects to provide in-region interLATA service through a pre-existing affiliate, as BellSouth has done, it must show how it has identified and corrected any improper subsidization or discrimination that may already have occurred prior to its application.[38] Here,

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[37] Another internal system identified by some BOCs requires that all transactions with a section 272 affiliate be approved by an oversight team before the transaction may proceed. McFarland Aff. ¶ 59.

[38] The Texas Commission and the staff of the California Commission both have recently acknowledged the need for BOCs and their section 272 affiliates to identify and true up past transactions that otherwise would provide the affiliate with unfair, anticompetitive advantages as it entered the long-distance market. See McFarland Aff. ¶ 65.

BellSouth and BSLD have not presented any evidence as to whether they have made any systematic efforts to identify or correct -- through "true up" or otherwise -- past transactions that have impermissibly subsidized BSLD or otherwise discriminated in favor of BSLD. The risk that such inappropriate subsidization or discrimination has occurred is substantial in this case, because BellSouth has admitted engaging in numerous large transactions with BSLD and, although claiming it is in compliance with Section 272, has stated repeatedly that it has been operating to date under the view that none of the transactions between it and BSLD have been subject to the restrictions of section 272 or the Accounting Safeguards Order. McFarland Aff. ¶¶ 64-65.

D. BellSouth And BSLD Have Not Established They Have Separate Officers And Directors Under Section 272(b)(3).

BellSouth and BSLD also fail in this application to meet their burden of establishing that they have "separate officers, directors, and employees" within the meaning of section 272(b)(3). This requirement is breached where officers of the BOC and section 272 affiliate ultimately report, as a practical matter, not to their own independent boards, but instead directly to the same officers or directors of their parent corporation. See Ameritech Michigan Order ¶¶ 353-362. Here, BellSouth and BSLD have not presented any information regarding their reporting structures to meet this burden. McFarland Aff. ¶¶ 67-68. Without any such evidence, BellSouth and BSLD cannot establish that their officers, directors, and employees are truly independent, as required by section 272(b)(3).

E. BellSouth's Planned Use Of CPNI Under Section 222 Cannot Be Squared With The Nondiscrimination Requirements Of Section 272.

BellSouth intends to share CPNI with BSLD to the full extent allowed under the Commission's CPNI Order regarding section 222 of the Act. See Varner Aff. ¶¶ 232, 229.

In the Non-Accounting Safeguards Order, the Commission held that CPNI is subject to the nondiscrimination requirements of section 272 because "the term 'information' [in Section 272] includes, but is not limited to, CPNI." Id. ¶ 222. The CPNI Order, however, reversed this decision, holding instead "that section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates." CPNI Order ¶ 169. AT&T has requested reconsideration of this aspect of the CPNI Order, which purports to authorize BOCs to discriminate in favor of their section 272 affiliates in violation of the plain language and intent of section 272's nondiscrimination requirements.[39] McFarland Aff. ¶ 76. BellSouth and BSLD should not -- and cannot sustainably -- be found in compliance with section 272 without having committed to provide BSLD and other entities, on identical terms and conditions, with equal access to its CPNI. BellSouth and BSLD have not made such a commitment.

F. This Commission Should Adhere To Its Prior Holding In The Ameritech Michigan Order Requiring BOCs To Make Equal Access Disclosures Before Marketing Their Affiliate's Services During Inbound Calls

BellSouth intends to instruct its marketing representatives immediately to recommend BSLD long distance service at the outset of inbound calls for new service, and to read a random list of other available IXCs only "if requested" to do so by the caller. Varner Aff. ¶ 248. Under sections 251(g) and 272(g), such steering of customers is unlawful. The Commission so held in the Ameritech Michigan Order. Relying on its earlier conclusions in the Non-Accounting Safeguards Order, the Commission ruled that an even less-aggressive marketing script was

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[39] For example, under the CPNI Order, a BOC may provide its section 272 affiliate with CPNI information, without customer approval, where the BOC is providing local service to the customer and the section 272 affiliate is providing long distance service to the customer. See CPNI Order ¶¶ 158-69; McFarland Aff. ¶ 76. By contrast, where the BOC is providing local service to a customer and an unaffiliated carrier provides long distance service, the unaffiliated carrier must obtain the affirmative written consent of the customer to obtain the local CPNI.

"inconsistent on its face" with the equal access requirements mandated by section 251(g) and would allow BOCs "to gain an unfair advantage over other interexchange carriers." Ameritech Michigan Order ¶ 376. The Commission's subsequent, unannounced, and unexplained decision in the South Carolina Order to reverse these interpretations of sections 251(g) and 272(g) was flawed both procedurally and substantively, and should not be followed here.

By failing squarely to confront its prior holding in the Ameritech Michigan Order and cogently to explain its radical reinterpretation of the statute, the South Carolina Order lacks an adequate basis for its new holding.[40] The Commission also erred by failing to consider alternatives that would have preserved essential requirements of equal access. See Professional Pilots Federation v. F.A.A., 118 F.3d 758, 763 (D.C. Cir. 1997); McFarland Aff. ¶¶ 80 n.47, 81-82 (describing alternatives). And because the plain language of section 251(g) requires continuance of the equal access regime "until explicitly superseded by regulations," the Commission erred by reversing course through adjudication rather than rulemaking.[41]

The Commission's abrupt re-reading of the Act also cannot be squared with its substantive requirements. Apart from citations to material that was considered in the Ameritech Michigan Order (e.g. the NYNEX ex parte and the Non-Accounting Safeguards Order), and which thus cannot explain the Commission's about-face, the Commission merely asserted without explanation that it needed to strike a new balance between sections 251(g) and 272(g). South

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[40] See Central State Motor Freight Bureau, Inc. v. I.C.C., 924 F.2d 1099, 1109 (D.C. Cir. 1991) (agency must "provid[e] cogent reasons for" changing statutory interpretation, "confront the issue squarely and explain why the departure is reasonable"); see Davila-Gardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994); Advanced Micro Devices v. CAB, 742 F.2d 1520, 1542 (D.C. Cir. 1984).

[41] An agency's ordinary discretion to proceed by rulemaking or adjudication, e.g., SEC v. Chenery, 332 U.S. 194, 202-03 (1947), must yield to an express statutory prescription for rulemaking. Perales v. Sullivan, 948 F.2d 1348, 1356 (2d Cir. 1991).

Carolina Order ¶ 238. There is no statutory basis for balancing, however, because section 272(g) does not even refer to, let alone displace, the unequivocal mandate in section 251(g) to preserve equal access. The Commission's prior orders make plain, moreover, that the joint marketing provisions of section 272(g) can and must accommodate the equal access requirements of section 251(g). See Non-Accounting Safeguards Order ¶ 292; Ameritech Michigan Order ¶ 375.

Finally, in addition to running afoul of its equal access obligations, BellSouth's marketing plans also falls outside the scope of section 272(g). BellSouth states that it intends to assist BSLD in the "development and creation of packages of local and long distance services offered on an integrated basis." See Cochran Aff. ¶ 30; McFarland Aff. ¶ 86. These services, however, appear to be the very type of "planning, design, and development" of BSLD's offerings that the Commission has held is outside the scope of section 272(g)(3). Non-Accounting Safeguards Order ¶ 296. Because these services are not "joint marketing" within the meaning of section 272(g), they can be provided only if they are shown to be available on the same terms to other IXCs, which showing BellSouth has not even attempted.

In sum, BellSouth and BSLD have not met their burden of showing that they will operate in accordance with section 272 if granted in-region interLATA authority. This application can be rejected on this basis alone.

IV. BELLSOUTH'S ENTRY INTO THE INTEREXCHANGE MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST

Finally, BellSouth's application should be denied because BellSouth has not met its burden to show that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." § 271(d)(3); see Ameritech Michigan Order ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied."). BellSouth's contrary contentions are meritless. As the Department of Justice explained in rejecting BellSouth's prior "public interest" arguments, BellSouth and its expert witnesses "significantly overvalue the benefits of the BOC's long distance entry now, and virtually ignore the benefits to be gained from opening . . . local markets." DOJ La. Eval. at 34. Indeed, granting BellSouth interLATA entry now would harm consumers in local and long distance markets alike.

A. The Absence Of Competition In Louisiana Local Exchange Markets Demonstrates That BellSouth's Entry Into The Interexchange Market Would Be Inconsistent With The Public Interest

In the Ameritech Michigan Order, the Commission held that the public interest "inquiry should focus on the status of market-opening measures in the relevant local exchange market" (id. ¶ 385) and determine whether the "local telecommunications market is, and will remain, open to competition." Id. ¶ 386. For all practical purposes, the local market in Louisiana remains closed to competition, and BellSouth retains a rock-solid monopoly in the provision of exchange and exchange-access service and facilities. For this reason alone, BellSouth's entry into the interLATA market in Louisiana could not be in the public interest.

1. There Is No Effective Competition In The Local Exchange Market

As the Commission has reaffirmed, the local exchange market remains "one of the last monopoly bottleneck strongholds in telecommunications." Non-Accounting Safeguards Order